JUN 19 1968

No. 22,593

IN THE

United States Court of Appeals
For the Ninth Circuit

EDGAR HERBERT VICKERY,
Appellant,

vs.

FISHER GOVERNOR COMPANY,
Appellee.

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

I

JURISDICTIONAL STATEMENT

Appellee (hereafter called "Fisher") accepts the jurisdictional statement set forth in the Brief for Appellant (hereafter called "Vickery").

II

STATEMENT OF THE CASE

Since Vickery's Statement of the Case is not complete in several respects and contains irrelevant matter in many other respects, Fisher submits a concise abstract or statement of the case, as required by Rule 18.

A. The Pleadings

This action involves certain Royalty and Sales Agreements relating to ball valves (R. 7-34, reproduced as Appendices A and B respectively in Vickery's Brief). These Agreements were entered into between the parties in October, 1960 and were terminated by Fisher as of December, 1965 by written notice (R. 35) pursuant to Fisher's "unrestricted right to terminate this agreement at any time" (Paragraph 6 of the Royalty Agreement, R. 11).

The Amended Complaint alleges that Fisher's exercise of its unrestricted right of termination constituted a breach of the very Agreements which granted this right and, in addition, constituted a breach of a purported fiduciary obligation which Vickery alleges should be imposed upon the contractual obligations set forth by these Agreements. Vickery bases his allegations solely upon certain oral representations purportedly made by Fisher during the negotiations which preceded the preparation and execution of said Agreements.

Fisher's Answer denies any breach of contractual or fiduciary obligation and asserts that the termination was a proper exercise of the "unrestricted right" of termination expressly agreed to by both parties and specifically included in the Agreements at the time of their execution.

Fisher also has counterclaimed (a) for Declaratory Judgment that said Agreements were terminated as of December, 1965; (b) for Declaratory Judgment that Vickery did not have legal right and title to the

patent applications sold by Vickery to Fisher in that Vickery was not "the original, first and sole inventor" thereof as he had represented under oath to the Patent Office; and (c) for judgment dismissing the Amended Complaint for unclean hands due to Vickery's fraudulent and inequitable conduct in connection with the subject matter of the Agreements here in issue.

Only the right of Fisher to terminate the Agreements under the unrestricted termination provision is involved in the Summary Judgment here under appeal, the District Court having expressly directed that such judgment be entered in favor of Fisher with respect to Vickery's First Amended Complaint (R. 391).

B. History of the Agreements in Suit

Fisher is a long established manufacturer and distributor of a wide variety of valves, actuators and other related devices used to control gas and liquid flow in many different applications. Prior to the Agreements here in suit, Vickery marketed certain valves primarily adapted for military or governmental end use. He had represented to Fisher that he had developed various types of ball valves and related actuators and devices, upon which he had filed several patent applications and that he possessed wide technical knowledge, experience and creative ability.

In 1960, Vickery and Fisher entered into certain negotiations which ultimately culminated in the Royalty and Sales Agreements here involved. These

Agreements, as finally executed, were the joint and considered results of numerous conferences, negotiations and bargaining between the respective parties and their counsel. In its opinion of July 19, 1967, the District Court held that Vickery was "an independent contractor who has dealt at arm's length, in entering into this agreement, and I don't think there is any dispute about this, by negotiations with the defendant, with both parties having a lawyer represent them" (T. 76). Various proposals and counterproposals of course were made during such negotiations but all of the terms finally agreed upon by the parties were expressly embodied in the Agreements as executed.

Vickery's Amended Complaint admits (R. 155) that during the negotiations Fisher insisted that it have the "unrestricted right to terminate the Agreements at any time" during the life thereof, and this requirement was unequivocally set forth in Paragraph 6 of the Royalty Agreement, as follows:

> Fisher has the unrestricted right to terminate this agreement at any time giving Vickery at least sixty (60) days prior written notice by U. S. Registered Mail addressed to Vickery at his last known address . . .

Vickery further has admitted that there is no other writing or document, executed by either party, which amends said Agreements, and that Fisher's written notice of termination, dated October 2, 1965, fully complied with all of the procedural requirements for termination set forth in the Agreements (R. 326).

C. Fisher's Exercise of Its Right to Terminate

In the Royalty Agreement, Vickery agreed to sell Fisher his ball valve developments and patent rights (Vickery brief, App. A, p. 2) to provide technical assistance and continuing development of improvements and additional inventions and to keep from competing with Fisher in the development and marketing of ball valves until Fisher exercised its right to terminate (Vickery brief, App. A, p. 5). Fisher agreed to pay an initial sum plus royalties and commissions up to a maximum period of ten years subject, however, to Fisher's unrestricted right to terminate the Agreement at any time (Vickery brief, App. A, p. 5). While the Agreement expressly did not limit Fisher's "unrestricted right to terminate", it did provide for different consequences depending upon whether Fisher elected to terminate either during or after an initial five year period.

Termination Within First Five Years	**Termination After First Five Years**
(1) Fisher has to return all physical devices and materials	(1) Fisher retains ownership of all physical devices and materials
(2) Fisher has to return all patents and applications assigned by plaintiff	(2) Fisher retains ownership of all patents and applications assigned by plaintiff
(3) Fisher has to terminate manufacture and sale	(3) Fisher may continue manufacture and sale
(4) Fisher loses benefit of continuing Vickery assistance, development and inventions	(4) Fisher loses benefit of continuing Vickery assistance, development and inventions
(5) Vickery can compete with Fisher in the development and marketing of ball valves	(5) Vickery can compete with Fisher in the development and marketing of ball valves

In its Order of December 18, 1967, the lower Court held that *"the contract is unambiguous in that unrestricted right of termination means exactly what it says"* (R. 483) (Emphasis added). The option to terminate the contract either during or after the initial five year period was expressly intended to provide Fisher with an important business alternative, namely, whether the benefits of Vickery's non-competition restriction and his continuing technical contributions would economically justify the amount of royalties which would have to be paid for such benefits during the second five year period.

During the first five years of the Agreement, Fisher paid Vickery approximately $750,000.00 in full compliance with the royalty and sales commission provisions of the Agreements (R. 327). If Vickery had continued to make inventive contributions sufficient to warrant continued royalty payments, Fisher could have elected to keep the Agreements in force for the second five year period. Here, Fisher elected to give up the benefit of obtaining any continuing assistance, development and inventions from Vickery by exercising its unrestricted right of termination. All of these acts were in admitted accord with the express terms and conditions of the Royalty Agreement and cannot constitute any breach thereof.

As the District Court pointed out most explicitly in its opinion of July 19, 1967 (T. p. 76):

> "The Court: And I would include in the ruling that there has been no breach of any fiduciary relationship, because the defendant had

the right under the existing contract to terminate and did terminate them lawfully and rightfully under the language of Exhibits A and B . . . (if) they have a right to terminate it, I don't see any breach of anything, including any fiduciary relationship."

D. The Rulings of the District Court

Vickery has appealed from the Order of August 14, 1967 granting Summary Judgment and from the Order of December 18, 1967 denying Vickery's motions to set aside the Summary Judgment Order, for leave to amend the First Amended Complaint to add a new cause of action for reformation thereto, and to set aside the Pretrial Order filed on March 10, 1967.

For the convenience of this Court, the Order of August 14, 1967 (R. 390) has been reproduced as Appendix A herein and the Order of December 18, 1967 (R. 482) has been reproduced as Appendix B herein. An extract of the proceedings of July 19, 1967 covering the trial court's ruling in support of the Summary Judgment is reproduced herein as Appendix C.

E. The Questions on Appeal

The questions on appeal may be stated quite simply as follows:

1. Whether the lower Court was correct in holding that there is no genuine issue of material fact to bar the grant of Summary Judgment and that as a matter of law Fisher properly terminated and did not

breach the Royalty and Sales Agreements upon which the Amended Complaint is based; and

2. Whether the lower Court was correct in denying Vickery's belated motion filed after trial, to amend his First Amended Complaint to add a new cause of action for reformation of the Agreement for the reasons that said motion was unduly dilatory, that Fisher would be prejudiced thereby and that such amendment, if allowed, would be subject to a motion to dismiss as lacking any legal basis for reformatory relief.

III

ARGUMENT

A. AN "UNRESTRICTED" RIGHT TO TERMINATE MEANS EXACTLY WHAT IT SAYS

1. An unrestricted right of termination was a specific bargaining issue which Fisher insisted on as a condition to finalizing the contract.

The District Court's construction of the contracts in issue so as to give effect to Fisher's "unrestricted right of termination" was inescapable in the light of the plain, simple import of the language used by the parties themselves after vigorous debate, negotiations and bargaining over this precise point.

A number of proposed drafts of the agreement were exchanged between the parties (see plaintiff's declaration and preliminary drafts attached thereto beginning at R. 421) before the contract was finally executed. As the District Court noted in this connection,

Fisher refused to accept a contract which did not include an unconditional right of termination:

> "In fact, plaintiff's counsel submitted a proposed contract to defendant which excluded the right to terminate during the second five years of the contract. Defendant refused to accept this draft and plaintiff, knowing that he (plaintiff) was giving defendant an unrestricted right to terminate, signed the agreement." (R. 484)

The language of the final Agreement between the parties is quite clear:

> "6. Fisher has the unrestricted right to terminate this agreement at any time . . . if Fisher exercises its right of termination . . . both parties shall have released from all further obligations . . ." (Vickery's brief, Appendix, p. 5)

Moreover, Vickery concedes that the right of termination was a crucial consideration. In Par. IV of the First Amended Complaint, Vickery alleges:

> "(Fisher) *insisted* that Fisher have the right to terminate the . . . agreements at any time . . ." (R. 155, emphasis added)

After considering the various affidavits, declarations and preliminary drafts, the District Court likewise noted that Fisher's right of termination went to the essence of the contract.

> "Plaintiff . . . knew that the Defendant *insisted* on the right-to-terminate clause" (R. 484, emphasis added).

In addition to the specific termination procedure in Paragraph 6 of the Agreement, quoted above, there

are numerous other references throughout the Agreements to Fisher's right of termination:

> "(Subject) to termination prior to the end of said period as hereinafter set forth . . ." (Par. 3 Royalty Agreement, Vickery's brief, Appendix, p. 3)
>
> "7. In the event Fisher *exercises* the right of termination . . ." (ibid., Appendix, p. 6)
>
> "8. In the event of the termination of this agreement . . ." (ibid., Appendix, p. 6)
>
> "11. . . . (If) after Vickery's death, Fisher elects to exercise the right to terminate this agreement . . ." (ibid., Appendix, p. 8)

The Sales Agreement likewise contains language referring to a termination of the Royalty Agreement.

> "7. . . . (In) the event of cancellation of the aforesaid royalty agreement between the parties, this Agreement shall be cancelled automatically." (ibid., Appendix, p. 16)

The District Court, having fully considered all of the pleadings and exhibits thereto, together with the pretrial order, various stipulations, declarations, affidavits, and memoranda (R. 390) *concluded most emphatically:*

> (1) "that the contract clearly expresses the real intention of the parties . . . " (R. 484) and
>
> (2) "that the contract is unambiguous in that 'unrestricted right of termination' means exactly what it says. Thus, parol evidence cannot be introduced to change that language . . ." (R. 483)

2. Plaintiff's self-serving efforts to engraft on the plain language of the termination clause any unilateral limitations are precluded by both the doctrine of merger as well as the parol evidence rule.

Admittedly a great deal of negotiations, conferences, and bargaining preceded the final draft of the Royalty Agreement as executed by the respective parties. In the absence of mistake or fraud, all such preliminary negotiations and representations become merged into the actual written agreement (see *Murphy v. Continental Insurance Co.,* 178 Iowa 375, 157 N.W. 855; 17 Am. Jur. 2d, Contracts, 260). Where the written contract is a self-contained, integrated agreement, it is presumed to contain all the terms and conditions agreed to by the parties (see *McKenney and Seabury v. Nelson,* 220 Iowa 504, 262 N.W. 101; *Security Savings v. Capp.,* 193 Iowa 278, 186 N.W. 927). Evidence of preliminary conversations by the parties is inadmissible since they are deemed to be superseded by the final written agreement *(Corklin v. Silver,* 187 Iowa 819, 174 N.W. 573; *Indianapolis Terra-Cotta Co. v. Murphy,* 99 Iowa 633, 68 N.W. 898).

As the District Court also noted above, in the absence of ambiguity, parol evidence likewise is inadmissible to vary or alter the written terms of a contract. *(Gordon v. Witthauer,* 138 N.W.2d 918 (Iowa); *Schnabel v. Vaughn,* 140 N.W.2d 168 (Iowa).) Moreover, even where parol evidence is admissible, its use is restricted to resolving an ambiguity *(Conrad Milwaukee Corp. v. Wasilewski,* 141 N.W.2d 240 (Wisc.) and not to alter or contradict a specific term or pro-

vision in the written contract (*Crompton-Richmond Co. Inc. v. Smith,* 253 F.Supp. 980 (E.D. Penn. 1966)). This rule is stated very explicitly by the court in the case of *Aultman v. Meyers,* 33 N.W.2d 400, 239 Iowa 940, which also is cited in Vickery's brief p. 36, in noting that "parol evidence does not change or contradict the wording of the instrument, but only explains, clarifies or removes any doubts as to its meaning." The parol evidence rule under Iowa law is one of substantive law and not merely evidentiary (*Rasmus v. A. O. Smith Corp.,* 158 F.Supp. 70 (N.D. Iowa)).

It therefore is submitted that there is no ambiguity in the Agreement, that all preliminary negotiations are merged in the final written document, and that in any event, parol evidence can be used only to resolve, and not to contradict, the express provisions of a contract.

3. Fisher's right of termination did not exist in a vacuum but imposed consequences clearly spelled out in the contract and involved substantial economic-business considerations.

Parties to a contract typically provide a method of termination which the Courts enforce in accordance with the plain meaning of the language used (*Shain v. Washington National Insurance Co.* (8 Cir.), 308 F.2d 611; *Republic Coal Co. v. W. G. Block Co.* (Iowa), 190 N.W. 530; 17A C.J.S., Contracts, Secs. 396, 399; 12 Am. Jur., Contracts, Sec. 434), and irrespective of the reasons or motives of the party exercising the right (*American Machine v. DeBothezal,* C.A.2, 180 F.2d 342; *Green Bay Auto Inc. v. Willys,*

102 F.Supp. 151; *Rubinger v. I.T.&T.*, 193 F.Supp. 711; 17A C.J.S., Contracts, Sec. 399; see also 45 Harvard Law Review 378).

Notwithstanding the prerogative of private parties to bargain over the terms and conditions of a mutual agreement, it is respectfully submitted that Fisher did not merely have a "unilateral option to pay or not to pay" as suggested by Vickery (see Vickery brief, p. 30, Sec. 3). On the contrary, as a result of exercising its right of termination, Fisher had to surrender or give up valuable economic benefits in accordance with a formula laid out very explicitly in the contract:

> "7. In the event Fisher exercises the right of termination prior to October 1, 1965 (note that the contract became effective October 1, 1960), then and in such event Fisher shall be obligated to:
>
> transfer to Vickery, promptly after the date of termination, all of Fisher's right, title and interest in and to *all physical property* delivered to Fisher pursuant to Paragraph 1.3 which then is in existence, together with all designs and data in its possession relating to ball valves, free and clear of any interest of any third party and to deliver the same to Vickery; and
>
> assign and deliver to Vickery, promptly after the date of termination, *all patent applications* and patents which may have been issued thereon which (i) are assigned to Fisher pursuant hereto and (ii) may be assigned to Fisher pursuant to the terms hereof; and
>
> forthwith permanently *cease the production* and sale of any of the products specified in the

> above Paragraphs, except such products as Fisher may have in inventory on hand at the date of termination."

In addition to the physical products enumerated above, the Court also will note that Fisher, in effect, was purchasing not merely patents per se but also Vickery's technical skill, which was covered twofold, one by an affirmative duty to provide continuing consultation and invention services, and negatively by a noncompetition provision during the lifetime of the contract (Appendix, Royalty Agreement, Par. 5).

The exercise of Fisher's "unrestricted right of termination" therefore created an important business alternative. In the event the contract was terminated prior to the expiration of an initial five-year period, Fisher had to return various physical properties and patent rights. On the other hand, if the contract were terminated after the initial five-year period, Fisher lost the benefit of what Paragraph II of the First Amended Complaint describes as Vickery's "highly technical" engineering skills (R. 154). In its exercise of the termination provision, Fisher therefore had to elect whether Vickery's continuing technical contributions, if any, economically justified the amount of royalties which would have to be paid as consideration for his future services.

A secondary thrust in the Vickery brief, in an effort to avoid the plain meaning of Fisher's right of termination, is an argument (beginning at p. 33) to the effect that the Court should impose a judicial limitation on what would otherwise constitute an "un-

restricted right". The cases which Vickery cites for this proposition, however (1) fail to support such a principle; (2) involve different contractual provisions and (3) arise out of different factual settings.

> In *Richard Bruce Co. v. J. Simpson & Co.*, 243 N.Y.S.2d 503, a contract gave an underwriter "absolute discretion to terminate" *if the underwriter determined that market conditions . . .* etc. The Court held that the underwriter's determination of whether market conditions were favorable, had to be reasonable and not arbitrary.
>
> In *Dubois v. Gentry*, 184 S.W.2d 369, a lease provided for termination by the lessee "for any reason" *other than wilful refusal to abide by it. . . .* The Court accordingly held that the lessee's option was in effect limited and could only be exercised on a showing of reasonable grounds.
>
> In the case of *Quick v. Southern Churchman Co.*, 199 S.E. 489, 171 Va. 403, the parties had a bilateral ''right of termination" *for just cause,* which the Court again construed as requiring some showing of reasonable grounds and not mere whim.

The cases above cited are accordingly clearly distinguishable from the case at bar, in that they all have *express contractual limitations* on the exercise of a right of termination. The instant case, on the other hand, achieves essentially the same results by expressly spelling out the contractual results or effects of the exercise of such a power, so that its exercise is not capricious or unilateral, but instead imposes

substantial economic consequences in accordance with a formula agreed to by the parties.

B. THERE WAS NO FIDUCIARY DUTY

Vickery urges that the circumstances of the parties resulted in a fiduciary and confidential relationship between them and that Fisher breached obligations imposed by the law under that relationship when it exercised its contractual right to terminate the Agreements. No case cited by him, however, discloses factual situations comparable to the facts in the instant case.

In neither *Stevens v. Marco,* 147 C.A.2d 357, 305 P.2d 669 (1956), nor *Saco-Lowell Shops v. Reynolds,* 141 F.2d 587 (4 Cir. 1944), did the defendant terminute the arrangement between the parties under an express right given in the contract. Furthermore, in the *Stevens* case, a release executed by the plaintiff was obtained by the defendant (an attorney who had undertaken to prosecute plaintiff's patent application) after falsely representing to plaintiff that no patent was going to issue. The Court held that his false representation made the release invalid from its inception and the plaintiff was not bound thereby.

In the case of *Baker Oil Tools v. Burch,* 71 F.2d 31 (10 Cir. 1934), the arrangement between the parties was not entirely set forth in the written contract, and there were collateral undertakings not covered by the writing nor referred to therein. In the course of its opinion, the Court observed, "If this suit were on the

license agreement alone, as Baker contends, the preliminary negotiations would be merged into it and evidence thereof immaterial."

It is clear that Fisher entered into the Agreements in good faith, that it abided by all the terms and conditions of the Agreements while the same were in effect, including the payment to Vickery of $200,000.00 under the Royalty Agreement and some $525,000.00 under the Sales Agreement (R. 327), and that it exercised a right expressly given and paid for when it terminated the Agreements. The law requires nothing more than that a party live up to the terms of its contract and here Fisher has clearly done so. Vickery's position that a party can breach a contract or any kind of a fiduciary duty by exercising an unrestricted right expressly reserved to it under the contract is a wholly untenable one. Certainly, the cases cited by Vickery do not stand for such an unsettling proposition which would completely confuse otherwise orderly contractual arrangements.

It is important to bear in mind that Vickery was an independent contractor, that both parties were represented by able counsel throughout the contract negotiations, that the arrangement between the parties related to the *sale* of patent applications and related items of personalty and did not constitute a licensor-licensee relationship, and during the initial five-year existence of the contracts, Fisher paid over $750,000.00 to Vickery while at the same time investing over $1,000,000.00 in plant and equipment to develop the ball valve program. These facts are quite unlike the facts in the cases cited by Vickery

to support his position in this case. Here, no dollar investment was made by Vickery in setting up the Fisher facilities with which to carry on the ball valve business. Here, there was no franchise arrangement or licensor/licensee relationship where the licensor has retained title to the patents and the licensee is exploiting them, as in *Hyde Corporation v. Huffines,* 158 Tex. 566, 314 S.W.2d 763, cited by Vickery.

To the contrary, the instant case concerns the outright sale to Fisher of the patent applications for a valuable consideration and under circumstances where Fisher (not Vickery) was required to invest substantial sums of money to make the program commercially feasible. This case is simply not like the *Hyde* case nor the automobile dealer cases which have resulted in the finding of a fiduciary obligation (see remarks of the District Court, brief App. C, p. xiii).

Nor is it like *Winn v. Rudy Patrick Seed Co.,* 249 Iowa 431, 86 N.W.2d 678, where the defendant advanced funds to the plaintiff to cover the cost of seed to be purchased on the market by plaintiff. The issue in that case was whether an acceptance of a final settlement check by plaintiff constituted an accord and satisfaction and precluded any further accounting between the parties. The Court held that an accord and satisfaction existed in spite of claims by plaintiff that defendant engaged in intentional and fraudulent misrepresentations in inducing acceptance of the settlement check.

In *Lukens Steel v. American Locomotive Company* (N.D. N.Y.) 99 F. Supp. 442, the Court observes that

the relationship did *not* involve "arm's length" dealing (cf. finding of the District Court that Vickery was an independent contractor dealing at arm's length (brief App. C, p. xiii). Here again, the *Lukens* case is one that involves bad conduct at the beginning of the relationship, and therefore it manifestly is different from the facts of the case at bar.

Accordingly, it is submitted that the authorities relied upon by Vickery are inappropriate to support his contentions under the facts of this case. The Agreements particularly and explicitly defined the relationship and obligations of the parties. No other obligations should be or were intended to be superimposed upon or added to the plain words of the contract. Fisher's lawful exercise of an unrestricted termination right expressly granted to it by Vickery simply does not give rise to any breach of contract or breach of fiduciary duty action. Since this is solely a matter of law and there are not material questions of fact on this point, the ruling of the District Court should be sustained.

C. THE DISTRICT COURT PROPERLY DENIED VICKERY'S MOTION, MADE AFTER TRIAL, TO ADD A NEW CAUSE OF ACTION TO THE AMENDED COMPLAINT

Vickery filed his initial Complaint on October 22, 1965 charging only breach of contract (R. 1). Both parties engaged in extensive discovery proceedings, including the taking of depositions in California, Iowa and North Carolina. Hundreds of documents were produced, inspected and copied.

On September 19, 1966 following such discovery, Vickery filed his First Amended Complaint for Damages, again grounded only on alleged breach of contract (R. 153). After substantial trial preparation and the submission of extensive pretrial statements, this cause went to trial on July 19, 1967. At the trial, Fisher moved for a summary judgment that the Agreements in suit had properly been terminated pursuant to their express terms, and the District Court, after fully considering the documents on file and the oral arguments of counsel, directed that summary judgment be entered for Fisher with respect to Vickery's First Amended Complaint for Damages (R. 390).

On August 23, 1967, over one month after the trial, Vickery belatedly moved for leave to file a Second Amended Complaint for Damages which included, *for the first time in this case,* a new cause of action asking reformation of the Royalty Agreement because of alleged "mutual mistake of the parties" (R. 392-407). Vickery concedes that the alleged facts upon which this new cause of action is based were known to Vickery at the time he filed his original Complaint in 1965 (R. 421-425). This new cause of action accordingly could have been included in the original Complaint, or even in the First Amended Complaint, but it was not until after Vickery received an adverse ruling at the trial that he chose to urge this new theory of reformation.

Significantly, no explanation, excuse or justification for his undue delay has been offered by Vickery.

Vickery has been represented by the same counsel since the initial negotiations with Fisher, since the execution of the Agreements in question and during this entire lawsuit. It is noted that Vickery's belated motion to amend was not supported by any affidavit of Vickery or his counsel attempting to justify Vickery's dilatory tactics in moving to amend the Complaint after trial.

Under Rule 15(a), F.R.C.P., leave to amend should freely be given if justice so requires. This does not mean under any and all conditions, and the courts have refused amendment of a pleading where undue delay or prejudice will result from such amendment.

In *Foreman v. Davis,* 371 U.S. 178 (1962), the Supreme Court stated that leave to amend should be granted only "in the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. . . ."

In this case, not just one, but practically all of the above reasons were present to justify the District Court's denial of the motion.

Vickery's delay was undue because the cause of action for reformation could have been pleaded in the original Complaint filed two years before the motion to amend. However, Vickery did not do so and no substantive reasons have been given for his dilatory tactics.

Further, Vickery could have cured the alleged omission by asserting the new cause of action in his First Amended Complaint, but again he did not do so—and again no excuse has been given.

Still further, the allowance of the amendment would have resulted in undue prejudice to Fisher who had believed its lengthy and expensive trial preparation to be completed, based upon the issues raised by the original and First Amended Complaints. It is noted that Vickery's declaration in support of his motion relies upon certain purported statements made by one Paul Elfers, a former employee of Fisher (R. 422). Although Vickery took lengthy and extensive discovery depositions of Fisher's present and former employees, no deposition was taken of Mr. Elfers. If the motion had been granted it would have necessitated the reopening of discovery for one or more depositions. In addition, new motions, pretrial statements, pleadings and trial preparation would have been required with respect to the new issues raised by the proposed new cause of action.

In *Hancock Oil Co. v. Universal Oil Products Co.*, 129 F.2d 959 (9 Cir. 1941), a patent case, defendant sought to amend its Answer more than two years after it was filed. The District Court's decision denying the proposed amendment for undue delay was affirmed by the Ninth Circuit Court of Appeals.

Similarly, the undue delay in *C. E. Stevens v. Foster & Kleiser Co.,* 109 F.2d 764 (9 Cir. 1940), was the basis for the Court's denial of leave to amend. The Court considered that "the long attention of

eminent counsel on both sides" in the case was sufficient to sustain a summary judgment and deny a motion for leave to amend.

In *Caddy-Imber Creations, Inc. v. Caddy*, 299 F.2d 79 (9 Cir. 1962), a copyright case having facts similar to the present case, the Court denied leave to amend where, after the evidence was in, appellant for the first time urged new legal theories involving an express contract and a contract implied in law. The Ninth Circuit affirmed the District Court's action in denying leave to amend the pleadings to add new theories because of movant's undue delay and the prejudice which would have resulted from such a belated amendment.

Directly in point is *Inland Steel Products v. M.P.H. Manufacturing Corp.*, 25 F.R.D. 236 (D.C. Ill. 1959), a patent case where the Court denied leave to amend the Answer several years after the Complaint was filed, after extensive discovery had been taken and where there was "no showing of oversight, inadvertance, or excusable neglect to account for the long delay."

To support his argument that the District Court should have granted the belated motion to add a new cause of action, Vickery's brief urges several grounds —each of which is wholly unsupported by the facts and each of which is directly contrary to the District Court's findings.

For example, Vickery argues that he cannot be charged with delay (Vickery brief, p. 38). This is wholly contradicted by the Court's findings that Vick-

ery "has known the facts upon which he proposes to base his amendment from the outset of this action and thus has been derelict in not offering the amendment long before Summary Judgment was entered against him" (R. 483).

Vickery also argues that Fisher will not be prejudiced by the addition of the proposed reformation count (Vickery brief, pp. 38, 39). On the contrary, the Court found that Fisher "having done all his work in preparation for trial, stands to be prejudiced by the amendment in that he will be forced to re-prepare on a new theory of liability not heretofore brought to his attention" (R. 483).

Finally, Vickery argues that the proposed new count is needed to enable him to show that "by mutual mistake of the parties" the Agreements did not completely and accurately reflect their understanding (Vickery brief, p. 37). The Court correctly ruled that it would be a futility to permit the amendment for this purpose since the alleged cause of action pleaded therein could not be legally sustained. The carefully reasoned opinion of the Court holds (R. 483, 484):

> "Finally, were the plaintiff allowed to amend the complaint to set forth the count in reformation, such count would be subject to a motion to dismiss as the facts alleged therein do not show mistake, fraud, or inadvertence. On the contrary, it is uncontradicted in affidavits and pleadings demonstrate that the contract clearly expresses the real intention of the parties. Plaintiff (who was at all relevant times represented by very able counsel) knew that the defendant insisted on the

right to terminate clause. In fact, plaintiff's counsel submitted a proposed contract to defendant which excluded the right to terminate during the second five years of the contract. Defendant refused to accept this draft and plaintiff, knowing that he (plaintiff) was giving defendant an unrestricted right to terminate, signed the agreement.

> 'A Court of equity will not reform a contract when all of the parties thereto acted with full knowledge of an omission before signing. It is only when stipulations which the parties *intended to express* have been omitted by mistake or through fraud.' (sic) (emphasis added) *Graves v. Greenfiel,* 196 Iowa 696, 195 N.W. 253 (1923).

In the case at bar, the allegedly omitted portions of the contract were omitted by design rather than by mistake, fraud, or inadvertance. Thus, there is presented in the proposed amendment, no ground for reformatory relief."

It is manifest that Vickery is wholly unable to show any valid legal reason for again amending his Complaint to add a new cause of action two years after the filing of the lawsuit, and after completion of discovery and the granting of summary judgment at the trial. The District Court's denial of the motion to amend was clearly proper and necessary under the circumstances.

IV

CONCLUSION

For the reasons stated above, it is respectfully submitted:

That this Court should affirm the Order Granting a Summary Judgment in favor of Defendant entered on August 14, 1967, as well as the Order Denying Plaintiff leave to file an Amended Complaint adding a new cause of action for reformation, said Order being made on December 18, 1967, upon the grounds that appellant has failed to sustain the burden of showing error as required by Rule 52, Federal Rules of Civil Procedure.

Dated, June 11, 1968.

Pelton & Gunther,
By Thomas N. Kearney,
Bair, Freeman & Molinare,
By Sheldon Witcoff,
Cartwright, Druker, Ryden & Fagg,
By Rex J. Ryden,
Attorneys for Appellee.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Thomas N. Kearney,
Attorney for Appellee.

(Appendices A, B and C Follow)

Appendices A, B and C

Appendix A

United States District Court,
Northern District of California

Civil Action No. 44,301

Edgar Herbert Vickery, Plaintiff, vs. Fisher Governor Company, an Iowa corporation, Defendant.	

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

The above-entitled action having come on regularly for trial on July 19, 1967; and

The Court having considered all of the pleadings and exhibits thereto, together with the pre-trial order and all of the stipulations, admissions, declarations, affidavits, pre-trial statements and memoranda of points and authorities on file herein; and

The Defendant having renewed a motion for summary judgment previously made by Defendant, pursuant to Rule 56, Federal Rules of Civil Procedure, on the ground that as a matter of law Defendant properly terminated and did not breach the Royalty and Sales Agreements on which Plaintiff's amended complaint is based; and

The Court having heard oral argument of counsel on said renewed motion in open court at the time of trial; and

The Court having considered the matter and expressed the basis for its decision in open court.

The Court now expressly determines that there is no genuine issue of material fact with respect to the subject matter of said motion, except as to the matter of the amount of commissions due and unpaid by Defendant to Plaintiff pursuant to the terms of Subparagraphs (C) and (D) of Paragraph 5 of said Sales Agreement, which amount, by the approval of the form of this order, the parties have agreed is $1,439.31 and which amount Defendant has agreed to pay to Plaintiff forthwith; and

The Court now expressly determines that there is no just reason for delay, it therefore is

ORDERED that said motion be and the same hereby is granted, and it is expressly directed that judgment be entered herein in favor of Defendant with respect to Plaintiff's First Amended Complaint for Damages.

Made on July 19, 1967 and presented for signature on August ......, 1967.

....

United States District Judge

Approved as to form:

Pelton & Gunther

By..

Attorneys for Defendant

Edward K. Allison

Attorney for Plaintiff

Appendix B

United States District Court,
Northern District of California

Civil Action No. 44,301

Edgar Herbert Vickery, Plaintiff,	
vs.	
Fisher Governor Company, an Iowa corporation, Defendant.	

ORDER

It Is Ordered that the Motion of the plaintiff to set aside the order granting motion for summary judgment and the judgment entered pursuant thereto on August 14, 1967 and to grant plaintiff a new trial pursuant to Rule 59(a) of Federal Rules of Civil Procedure, having been submitted and the Court having duly considered the same, is DENIED.

It Is Further Ordered that motion of the plaintiff to vacate the order granting motion for summary judgment and the judgment entered pursuant thereto on August 14, 1967 pursuant to Rule 59(e) of Federal Rules of Civil Procedure, having been submitted and the Court having duly considered the same, is DENIED.

It Is Further Ordered that the motion of the plaintiff for leave, pursuant to Rule 15(a) Federal Rules of Civil Procedure, to amend his First Amended Complaint for damages to add a second cause of action thereto for reformation of said agreement, having been submitted and the Court having duly considered the same, is DENIED for the following reasons:

1. The affidavits on file, along with the memorandum and pleadings, afford ample proof to the effect that plaintiff has known the facts upon which he proposes to base his amendment from the outset of this action and thus has been derelict in not offering the amendment long before summary judgment was entered against him.

2. Defendant, having done all his work in preparation for trial, stands to be prejudiced by the amendment in that he will be forced to re-prepare on a new theory of liability not heretofore brought to his attention.

3. More important, the contract is unambiguous in that "unrestricted right of termination" means exactly what it says. Thus, parole evidence cannot be introduced to change that language. The very basis upon which the plaintiff seeks to amend his complaint is supportable only by that parole evidence which may not be introduced to alter the agreement.

4. Finally, were the plaintiff allowed to amend the complaint to set forth the count in reformation, such count would be subject to a motion to dismiss as the facts alleged therein do not show mistake, fraud, or inadvertence. On the contrary, it is uncontradicted in

affidavits and pleadings demonstrate that the contract clearly expresses the real intention of the parties. Plaintiff (who was at all relevant times represented by very able counsel) knew that the defendant insisted on the right to terminate clause. In fact, plaintiff's counsel submitted a proposed contract to defendant which excluded the right to terminate during the second five years of the contract. Defendant refused to accept this draft and plaintiff, knowing that he (plaintiff) was giving defendant an unrestricted right to terminate, signed the agreement.

> "A court of equity will not reform a contract when all of the parties thereto acted with full knowledge of an omission before signing. It is only when stipulations which the parties *intended to express* have been omitted by mistake or through fraud." (sic) (emphasis added) *Graves v. Greenfiel,* 196 Iowa 696, 195 N.W. 253 (1923).

In the case at bar, the allegedly omitted portions of the contract were omitted by design rather than by mistake, fraud, or inadvertence. Thus, there is presented in the proposed amendment, no ground for reformatory relief.

It Is Further Ordered that plaintiff's motion for an order setting aside the pretrial order filed herein on March 10, 1967 is denied.

Dated this 15th day of December, 1967.

/s/ C. A. Muecke
U. S. District Judge

Original Filed Dec 18 1967
Clerk, U. S. Dist. Court
San Francisco

Appendix C

AN EXTRACT OF THE PROCEEDINGS OF JULY 19, 1967 COVERING THE TRIAL COURT'S RULING IN SUPPORT OF THE SUMMARY JUDGMENT

(T. pp. 67-77):

The Court: All right.

Well, gentlemen, I did do a lot of additional reading, and I also again very carefully went over the two agreements which are both stipulated to as being the agreements that pertain to this case, as far as any written agreements are concerned; I don't think there is any question about foundation, or anything of that sort, one pertaining to the Royalty Agreement, which is labelled Exhibit A to Complaint, and the other—Is that Exhibit B?

Mr. Allison: Yes, sir.

The Court: Yes. Exhibit B to the Complaint, pertaining to the Sales Agreement.

And I must say, first of all, I don't find any ambiguity in either of the agreements, and I will proceed and say why, for the record.

I find, for example, on page 3 of Exhibit A, which I have just referred to, being a royalty agreement, the words on the top of the first, not full paragraph, but the first full paragraph on the top of page 3, the 5th line, where it says, "subject to termination prior to the end of said period as hereinafter set forth," which again is a reference to the way in which the contract can be terminated.

In other words, modifying the full ten-year period.

Then there are three little paragraphs setting forth the royalties, and then again it refers to what would happen during the first five years, which I think

counsel for the plaintiff referred to, on the payment of not less than $20,000 royalties a year, and "thereafter, said minimum shall not apply."

These are references, in my opinion, to this difference in the five and ten-year period, and also to the manner in which the contract may be terminated.

Then we have the paragraph 6 on page 5 of the same agreement, which gives Fisher, in the words "unrestricted right to terminate this agreement," and I think it is agreed that the proper notice provisions were followed. That is stipulated between the parties?

Mr. Allison: Yes, sir.

The Court: And then on page 6, the sixth line from the top of page 6, it says that when this notice, the 60-day notice is given, that "without further act of either parties and both parties shall be released from all further obligations hereunder, except," and then it lists three specific exceptions, and these involve royalty payments to Vickery.

And I feel that it is not necessary if you cite specific payments that must be made to go on and cite specific payments that can't be made or shouldn't be made, since I think when you release someone from all obligations except for the three specific ones, I think you have covered the field.

And then, of course, I think where the right to exercise the termination prior to the end of the five years, as set forth in paragraph 7 of the same agreement, then of course again there were specific conditions, basically, that Vickery get everything back.

And "8" again refers to the termination of the agreement, and Vickery shall be entitled to retain all

sums of money that he has already been paid, and I would certainly think he would be entitled to all sums of money that may still yet be due and owed to him. I don't think there is any controversy about that.

Now, again there is a way of terminating the contract if Vickery should die, which suggests again it could be done without the full ten-year wait.

Now, with respect to the Sales Agreement, Exhibit B, I think the crucial paragraph there has to do with the small paragraph on page 6, which is 13 lines from the bottom of page 6 of Exhibit B, and says, "In the event of cancellation of the aforesaid Royalty Agreement between the parties, this Agreement will be cancelled automatically," which would seem to affect Exhibit B if the proper cancellation provisions are carried out in Exhibit A.

Now, the only modification in "B" I find at all, and I think if the paragraph I have just read was not in here, might suggest why the parties re-offered a sales agreement to Vickery, after cancelling both agreements, which is the next paragraph which immediately follows the one above, "This Agreement," meaning Exhibit B, being cancelled automatically, in which it sets forth the sales agreement, and I read this to mean the sales agreement itself can't be cancelled without respect to the consideration of how the royalty agreement is to be cancelled, unless there is a showing made that Fisher didn't cancel it arbitrarily, "but in the exercise of reasonable discretion and in pursuance of the good faith hereinabove mentioned."

So on the matter of whether there is ambiguity or not, I don't feel there is any ambiguity, and there-

fore I think the termination given by the notice, and so forth, given by the defendant to the plaintiff, did terminate the contracts.

Now, the next consideration is whether or not there is some sort of fiduciary relationship that applies, whether there is some context outside of the actual wording of the contract itself that should be considered, and I think that the problem we have there, I think there is a developing field of law, which I have referred to earlier, which I see is in Corbin, in Section 1266, Corbin on Contracts, which I had read rather carefully in another case; as a matter of fact, in that case I ruled differently than I will be ruling here, because we dealt there with a franchise, and with an automobile manufacturer, or some manufacturer, and this is a very different situation; so I think in this case here we have two parties dealing with each other, through their lawyers, and unless the court, some other court besides this court, will read into the "unrestricted right to terminate," which are the words set forth in Exhibit A, will read into those words that there must be good faith, and that a termination must be reasonable under the circumstances, or that there must be a reasonable exercise of the discretion to terminate, unless the court will go that far, some other court besides myself, and read "the unrestricted right to terminate" is modified by that, as some courts have done in some of these franchise cases, and Congress has apparently done in this automobile dealers so-called "day-in-court" act; if that should be the case, then of course the whole matter is open on every other issue in this case.

I think what is open, then, is the question of whether the defendant in giving the termination acted in good faith, acted reasonably in doing it, and that would then go into the issue of fraud, or go into the issue of what the patents covered. It might even go into the issue of whether or not the plaintiff was performing the way he should perform under the contract; in other words, acting diligently in trying to help in the development in this whole area of valve inventions and improvements, and so forth and so on; so I think that this is the doorway, if there is to be a doorway, to go beyond the ruling that I may give here.

And I will say that I am not making this ruling simply to shorten the time, or not give you your day in court, or anything of that sort, because I don't believe it should be done that way, but if there is to be any benefit at all from the ruling I am about to make, at least it is a real simple short legal issue, which, if it is decided adversely to the way I rule here today, then you can launch on to the long trial which I think would have to follow, which would entail considerable expense, apparently 20 or 40 witnesses, many days in court, which would then not be too easy a situation on the party that doesn't prevail. Whereas in this particular instance, and I am not ruling this way for that reason, at least if there is any satisfaction to be gained, it is that I think that this is the doorway to a trial determination which will then stand on all of the other issues.

But I frankly don't believe that the contract is ambiguous; I think proper notice was given; I think

the unrestricted right to terminate does not contain within it an implied condition of any kind, or an act in good faith, or acting reasonably under the circumstances; or a reasonable exercise of discretion; and so, therefore, I would grant the defendant's motion for summary judgment with respect to whether or not they properly terminated the contract.

I don't know if there is anything else I need to say. The record sets forth fully what I believe here.

Mr. Kearney: Thank you very much, Your Honor.

The Court: Now, is there an accounting problem still as to what is owed under the terms of the contract as it now exists.

Mr. Kearney: Your Honor, we will stipulate to take care of that.

The Court: All right.

Mr. Allison: Well, we will stipulate to the amount. That is something else again. We claim that there is some $15,000 in commissions due and owing under the contract, before the termination.

The Court: Well, what you could do is this: You could either stipulate to try to see if you can arrive at an agreement on that, or you could hold it off for further disposition as to any fact issues and law issues you might have on that.

Mr. Kearney: Well, I don't anticipate any difficulty in that, Your Honor. I stipulate that we will have our accountant submit their bill, and we will lean over backwards to compromise the situation.

The Court: Well, all I want to be sure is that you, on any remaining matters to be settled between

you—Certainly a motion for summary judgment can be granted, but it only goes to the issue of termination of this agreement. It doesn't settle any moneys that might be owing between you.

Mr. Allison: I understand that.

The Court: That is pretty obvious. So that if you can't settle that, I will be here, and if you feel that you must have a trial on that, or if you feel that you want to put it off, if you intend to appeal this whole matter, until the Circuit Court can decide whether what I decided here today was right or wrong, then you could, for example, if they should decide that I was wrong, you will have to go into the whole trial anyway.

Mr. Allison: Would you repeat that, Your Honor.

The Court: If they should decide that my ruling here today is wrong, then you would have to go into the whole trial in any case.

Mr. Allison: That is correct.

The Court: And it may be that you could hold in abeyance and both stipulate that if you can't agree and make any settlement without your waiving any rights to appeal this, then in that event you would hold it off until the 9th Circuit rules on this.

Mr. Kearney: I will so stipulate, Your Honor.

Mr. Allison: Now, Your Honor is going to be here?

The Court: I will be here until the middle of August.

Mr. Allison: So if we are unable to get together on the amount owed——

The Court: Yes, certainly, and that is why I am leaving it open to you, as to what you want to do.

Mr. Allison: Very well.

The Court: It seems to me it would make sense if you both can agree that if you can't settle without your client waiving any rights on what is owed under the contract so far, then the next thing to do would be to stipulate whether or not you can both agree to hold it off until you have an entire trial on this matter, in the event I am reversed; and in the event I am sustained, then just have a separate trial on just that issue.

Do you follow me?

Mr. Allison: Yes, sir.

The Court: I think that seems sensible.

Mr. Allison: Yes. Did I understand your Honor's ruling to preclude us introducing any evidence with respect to the fiduciary relationship between the parties, which is of course an independent tort apart from the breach of the contract on which Your Honor has ruled?

The Court: Well, I don't see how—Your plaintiff is an independent contractor who has dealt at arm's length, in entering into this agreement, and I don't think here is any dispute about this, by negotiations with the defendant, with both parties having a lawyer represent them; I don't think there is any dispute about that.

Mr. Allison: No question.

The Court: And I don't see, if they had a right to terminate under the terms of the agreement which each of them entered into, how there is by that reason any breach of any fiduciary relationship.

Mr. Allison: So your ruling goes to that?

The Court: Yes.

Mr. Allison: All right.

The Court: And I would include that in the ruling, that there has been no breach of any fiduciary relationship, because the defendant had a right under the existing contracts to terminate, and did terminate them lawfully and rightfully under the language of Exhibits A and B.

Mr. Allison: All right.

The Court: Now, of course, again if as part of these contracts is the matter of good cause, and there are conditions attached to it, which I don't see, then of course I think this is implicit in that, that that raises the question of whether there was a breach.

I don't know, it may be that the degree of care, the degree of good faith, the amount of what is reasonable under the circumstances, that might affect that standard, then, if that were introduced into it.

But I don't think, if they have a right to terminate it, I don't see any breach of anything, including any fiduciary relationship.

Mr. Allison: Thank you, sir.

The Court: Do you understand it?

Mr. Allison: Yes, I understand it.

The Court: Now, will you submit a form of judgment on this?

Mr. Kearney: Yes, sir, I will.

The Court: And I will be here in Courtroom 4.

Mr. Kearney: Thank you.

(The above-entitled matter was then recessed.)

No. 22,593

JUL 8 1968

In the

United States Court of Appeals

For the Ninth Circuit

EDGAR HERBERT VICKERY, *Appellant,* vs. FISHER GOVERNOR COMPANY, *Appellee.*	

Reply Brief for Appellant

On Appeal from the United States District Court
for the Northern District of California

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TABLE OF AUTHORITIES CITED

No. 22593

In the

United States Court of Appeals

For the Ninth Circuit

Edgar Herbert Vickery,	
	Appellant,
vs.	
Fisher Governor Company,	
	Appellee.

Reply Brief for Appellant

On Appeal from the United States District Court
for the Northern District of California

Appellant ("Vickery") will reply briefly to some of the arguments made by Appellee ("Fisher") in its brief.

I

THE DISTRICT COURT ERRED IN THE STANDARD OF INTERPRETATION WHICH IT APPLIED TO THE AGREEMENTS

In Paragraph 1 of Part III of Fisher's brief (pages 8-10), Fisher stoutly labors the obvious and never contested points that the Royalty and Sales Agreements contain termination

clauses and that Fisher insisted on the inclusion of such clauses in the agreements. Fisher also points out (page 9) that the District Court noted that Vickery had submitted to Fisher a proposed contract which excluded the right to terminate during the second five years of the term, that Fisher refused to accept this draft and, from this, the District Court concluded that Vickery signed the Royalty and Sales Agreements "Knowing that he (plaintiff) was giving defendant an unrestricted right to terminate." All of the foregoing begs the question at issue, which is: What did Vickery and Fisher *intend* by the use of the phrase in Paragraph 6 of the Royalty Agreement "Fisher has the unrestricted right to terminate this agreement at any time . . ."? (Appendix A, p. 5, Vickery brief). This is a question for judicial interpretation. As is emphasized in Vickery's brief at pages 5-7 and 32-33, the principal officers of Fisher represented to Vickery during the contract negotiations that this right of termination would be exercised only if Fisher determined that it could not manufacture and sell ball valves at a profit and that Vickery relied on those representations when he signed the agreements. In short, what Vickery intended by the above quoted phrase was what he thought Fisher intended, based upon the representations of its officers. That is, that Fisher had the unrestricted right to determine whether or not it could manufacture and sell ball valves at a profit. (In this regard, see Iowa Code, Section 622.22, which provides: "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it.") The District Court sought to ascertain the intention of the parties from a mere reading of the Royalty Agreement, and concluded that the above quoted phrase

was susceptible of but a single meaning. Thus, the Court erred in applying the wrong standard of interpretation. Professor Wigmore points out (Wigmore on Evidence, Third Ed.) in Section 2458 that "The process of Interpretation is a part of the procedure of realizing a person's act in the external world." In Section 2460, he states that the standards of interpretation fall into four classes: (1) the popular standard, meaning the common and normal sense of words; (2) the local standard, including the special usages of a religious sect, a body of traders, etc.; (3) *the mutual standard, covering those senses which are peculiar to both of the parties to a transaction, but shared in common by them;* and (4) the individual standard of one party to an act, as different from that of the other party. He then analyzes these standards and concludes in Section 2462, page 194:

> "There is, then, neither in theory, nor in policy any basis for an absolute rule declaring that when a word has a 'plain meaning', i.e., by the popular standard, neither the local nor the mutual nor the individual standard can be substituted. Such a rule is still maintained by many utterances like those above quoted. But its vogue is disappearing; as may be seen from the utterances of judges who have plainly championed the modern and more liberal rule."

In short, the District Court erred by applying the popular standard without consideration of the applicability of the mutual standard. Or, as stated in 3 *Corbin on Contracts,* Section 535 (Quoted with approval in *Hamilton v. Wosepka,* .... Ia. ...., 154 NW 2d 164 at 168:

> "It is true that when a judge reads the words of a contract he may jump to the instant and confident opinion that they have but one reasonable meaning and that he knows what it is. A greater familiarity with dictionaries and usages of words, a better under-

standing of the uncertainties of language, and a comparative study of more cases in the field of interpretation, will make one beware of holding such an opinion so recklessly arrived at."

II

THE DISTRICT COURT ERRED IN APPLYING THE PAROL EVIDENCE RULE TO PRECLUDE THE RECEPTION OF EVIDENCE NECESSARY FOR A PROPER INTERPRETATION OF THE AGREEMENTS

As Fisher indicates on page 10 of its brief and as is evident from a reading of the transcript, the District Court concluded that parol evidence could not be introduced to vary what the Court previously had determined was the plain and unambiguous meaning of the phrase in question. This antiquated theory is thoroughly criticized by Professor Wigmore at Section 2461 and 2462. In *Hamilton v. Wosepka, supra,* a 1967 Iowa Supreme Court case which is more recent than all of the cases cited on this point by Fisher and which considers, in depth, the admissability of parol evidence as an aid to the interpretation of a written instrument, the Court flatly held that extrinsic evidence that throws light on the situation of the parties, the antecedent negotiations, the attendant circumstances and the objects they were thereby striving to attain is necessarily to be regarded as relevant to ascertaining the actual significance and proper legal meaning of the agreement. In so holding, the Court quoted with approval from 3 *Corbin on Contracts,* Section 579 (at page 169 of 154 NW 2d) as follows:

> " 'It is true that the language of some agreements has been believed to be so plain and clear that the court needs no assistance in interpreting. Even in these cases, however, it will be found that the court has had the aid of parol evidence of the surrounding circumstances. *The meaning to be discovered and*

> *applied is that which each party had reason to know would be given to the words by the other party.* Antecedent and surrounding factors that throw light upon this question may be proved by any kind of relevant evidence. * * * Such testimony does not vary or contradict the written words; it determines that which cannot be varied or contradicted. * * *' " (Emphasis added)

In *Keding v. Barton,* .... Ia. ...., 154 NW 2d 172, decided the same day as *Hamilton,* the court stated:

> "Evidence of the circumstances [surrounding the making of the contract] is always admissible in aid of the interpretation of an integrated agreement. This is so even when the contract on its face is free from ambiguity."

See also the concurring opinion of Justice Traynor in *Universal Sales Corp. vs. California Press Mfg. Co.,* 128 P2d 665, 20 C.2d 751, page 776, where he stated:

> "I do not agree with the premise implicit in the majority opinion that parol evidence as to the meaning of the contract was admissible only because the contract is ambiguous on its face. Words are used in an endless variety of contexts. Their meaning is not subsequently attached to them by the reader but is formulated by the writer and can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words. The exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended. (Cal. Code Civ. Proc. Sections 1856, 1860; see Wigmore on Evidence 3rd ed., Sections 2458-2478; 'The Theory of Legal Interpretation,' 12 Harv. L. Rev. 417, by Oliver Wendell Holmes (then Chief Justice of Massachusetts.)"

III

FISHER'S INTERPRETATION OF THE AGREEMENTS PRODUCES ARBITRARY, UNFAIR AND ABSURD RESULTS WHICH COULD NOT HAVE BEEN THE INTENT OF THE PARTIES

In Paragraph 3 of Part III of Fisher's brief (pages 12-16), Fisher attempts to support its argument that the exercise of its right of termination imposed substantial economic-business considerations by referring to provisions of the Royalty Agreement which are not relevant to the issue before this Court. There is no question that if Fisher had exercised the right of termination prior to October 1, 1965, Fisher would have had to give up valuable economic benefits pursuant to the provisions of Paragraph 7 of the Royalty Agreement set forth on Page 13 of Fisher's brief. But Fisher did not exercise its rights of termination prior to October 1, 1965; it was exercised on October 2, 1965. Accordingly, we are not concerned with the terms of Paragraph 7.

At page 14 of its brief, Fisher argues that the exercise of the right of termination after October 1, 1965 would mean a loss to Fisher of Vickery's consulting services to be rendered pursuant to Paragraph 5 of the Royalty Agreement and ". . . Fisher therefore had to elect whether Vickery's continuing technical contributions, if any, economically justified the amount of royalties which would have to be paid in consideration for his future services." This argument is fallacious. Paragraph 3 of the Royalty Agreement provides that royalties are to be paid only on net annual sales of products in excess of $500,000. Thus, royalties are a function of sales, not services. In essence, Fisher is arguing for an interpretation of the Royalty Agreement which contemplates that the parties intended that Fisher should have the right during the first five years

of the term to develop products using Vickery's patent applications, patents, technical knowledge and know-how (with projected sales during the second five years of the term of $64,210,000, see page 10, Vickery's brief) and also have the right, just when those developed products would have begun to bear fruit for Vickery in terms of royalties and sales commissions, to terminate the Royalty and Sales Agreements, thus suffering the "loss" of the technical knowledge of Vickery which Fisher already had obtained during the first five years of the term. In short, as Vickery pointed out in his opening brief, Fisher is contending for an interpretation which gives Fisher the unilateral option, during the second five years of the term, to pay or not to pay the royalty and sales commission consideration specified in the agreements.

At page 6 of its brief, Fisher also argues that the option to terminate after October 1, 1965 was "intended to provide Fisher with an important business alternative, namely, whether the benefits of Vickery's non-competition restriction . . . would economically justify the amount of royalties which would have to be paid for such benefits during the second five year period." Thus, Fisher asks this Court to believe that Fisher, which had the government granted monopoly of six United States Letters Patent covering the products in question (R. 328, lines 17-22), which owned all of Vickery's engineering drawings, which had obtained all of Vickery's technical know-how, which was a "long established manufacturer and distributor of a wide variety of valves, actuators and other related devices" (Fisher's brief, page 3) and which was tooled for and in production of products with projected sales during the next five years of $64,210,000, actually made an "important" business decision to forego the restraint against the competition of Vickery, an individual, when Fisher terminated the agree-

ments. Interestingly enough, this consideration was never mentioned by any of the officers of Fisher whose depositions were taken.

Both of the foregoing arguments produce arbitrary, unfair and absurd results which are contrary to all established canons of judicial interpretation.

IV
FISHER'S FIDUCIARY DUTY

On page 17 of its brief, Fisher suggests that Vickery's position that a party can breach a contract or any kind of a fiduciary duty by exercising an unrestricted right expressly reserved to it under a contract is an "unsettling proposition which would completely confuse otherwise orderly contractual arrangements." This proposition is no more "unsettling" than the provisions of the Uniform Commercial Code, set forth at page 35 of Vickery's brief, which impose on every contract "an obligation of good faith in its performance" and which authorize the courts to "so limit the application of any unconscionable clause as to avoid any unconscionable result."

On page 17 of its brief, Fisher states, without reference to record source, that Fisher invested "over $1,000,000 in plant and equipment to develop the ball valve program." Vickery so alleged in Paragraph V of his initial complaint (R. 4), but not in his amended complaint. Fisher denied this allegation in Paragraph V of its initial answer (R. 37).

V
FISHER WILL NOT BE PREJUDICED BY THE GRANTING OF LEAVE TO VICKERY TO FILE AN AMENDED COMPLAINT

On page 22 of its brief, Fisher claims that the granting of Vickery's motion for leave to file an amended complaint will result in prejudice to Fisher because it will require the reopening of discovery for the taking of the deposition of

Mr. Elfers. Vickery has no intention of taking his deposition and hereby expressly waives the right to do so. Since Mr. Elfers is a former officer and director of Fisher, Fisher obviously does not have to take his deposition. The depositions of all other persons concerning the issue of reformation have been taken. Fisher also suggests that new motions, pre-trial statements and trial preparation also will be required. The motions Fisher has in mind are not known to Vickery, but a single cause of action for reformation could not invite a complex or extensive motion. An amendment to the pre-trial statement to treat the allegations in *one* new pleading paragraph in the amended complaint and a new answer to treat that single paragraph certainly cannot be considered to be unduly burdensome. Similarly, the trial preparation for this new cause of action will be solely restricted to the determination of the Iowa law on reformation; a task that is far from monumental.

With respect to the portion of the District Court's Order quoted on pages 24 and 25 of Fisher's brief, it is apparent that the basis for the District Court's conclusion there expressed is that "the contract clearly expresses the real intention of the parties." Thus, the Court erred for the reasons set forth in Parts I and II of this brief.

VI
CONCLUSION

For the reasons stated herein and in Vickery's opening brief, it is respectfully submitted that the Orders of the District Court appealed from should be reversed.

Dated: June 25, 1968

Ehrlich & Allison

By Edward K. Allison
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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